Gerrymandering for Partisan Advantage: A Legal Crossroads

Josh Marshall

The practice of legislators drawing election districts for partisan advantage, also known as "Gerrymandering," could either end in June 2018 or it could get much worse. The case of *Gill v. Whitford* heard by the Supreme Court in October raises a question that strikes at the heart of American values: is drawing election districts for partisan advantage unconstitutional? Or, more precisely: does a single-party controlled state legislature violate the Equal Protection Clause and the First Amendment rights of association and free speech of voters of the minority party by drafting a redistricting plan that systematically and durably dilutes the voting strength of those voters? The United States District Court in the western district of Wisconsin believes so, and a decision by the Supreme Court is due on appeal this coming June.

The issue of partisan gerrymandering in the United States has a complicated history. The practice dates back even further than a failed attempt by Anti-Federalists in Virginia to take James Madison's seat in the House of Representatives in 1788. The first legal claim against a legislative redistricting plan of any kind that was accepted by the Supreme Court was when one district had ten-times the population of another district, and thus one-tenth of the voting power. Racial gerrymandering was addressed shortly thereafter by the Supreme Court and Congress in the passage of the Voting Rights Act, developing the doctrine of "one-person, one-vote". It was not until 1986 that the Court found partisan gerrymandering to be under the Court's purview of justiciability. However, the Justices could not agree upon a standard through which to conclude "how much" partisan consideration is required for a court to find a map unconstitutional. Thirty years later, this question remains unanswered today. Justice Kennedy had the deciding vote in *Vieth v. Jubelier* in 2006, allowing partisan gerrymandering claims to possibly remain justiciable, but still holding out for a "limited and precise" standard in evaluating those claims.

Gill v. Whitford is a case where a professor at the University of Wisconsin sued the Chair of the State Election Board for disproportionately reducing the voting power of Democrats in Wisconsin through partisan gerrymandering. Following the 2010 census, the Republican-controlled Wisconsin legislature hired experts to draw the map that would strategically benefit the Republicans the most in the coming elections. The plaintiffs asserted a fervently contested social metric called the "Efficiency Gap" in order to measure partisan gerrymandering. The District Court sided with the plaintiff, accepting the Efficiency Gap and its surrounding legal test as the limited and precise standard the Kennedy sought in *Vieth*. The significance of this case, as opposed to similar cases in the past, lies with the progress in technology informing the legislators in drawing maps for partisan advantage. Furthermore, this case is likely to be the last partisan gerrymandering case to be heard before the Supreme Court before maps are redrawn following the 2020 census.

This research analyzes the arguments and likely outcomes of *Gill v. Whitford* through Supreme Court precedent, briefs for each of the parties, briefs *amici curiae*, and other related academic articles. The Efficiency Gap Chief Justice Roberts referred to as "sociological gobbledygook" may actually provide the desired quantitative feature of a standard test through which courts can evaluate the constitutionality of partisan gerrymanders which was adopted by

the District Court and restated by Justice Breyer at oral argument. This research further argues that even though such a standard could be a reasonable solution to resolving partisan gerrymandering claims, plaintiffs should only need to prove that a legislature intended to dilute voting power based on their political viewpoint.

Authorities:

Constitutions, Treaties, and Statutes:

- U.S Const. Amend. I, XIV.

Cases:

- *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265–66
- *Anderson v. Celebrezze*, 460 U.S. at 789 (1983)
- *Brown v. Board of Education*, 347 U.S. 483 (1954)
- Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008)
- *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2611 (2006)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
- *Norman v. Reed*, 502 U.S. 279, 288- 89 (1992
- *Reynolds v. Sims*, 84 S.Ct. 1362 (1964)
- *United States v. Salerno*, 107 S.Ct. 2100 (1987)
- *Vieth v. Jubelirer*, 124 S.Ct. 1771 (2006)
- *Whitford v. Gill,* 218 F.Supp.3d 846-853 (2016)

Records and Briefs:

- Brief *amici curiae* for Petitioner-Republican National Committee at 4, *Gill v. Whitford* No. 16-1161
- Brief *amici curiae* for Respondent-American Civil Liberties Union at 14, *Gill v. Whitford* No. 16-1161
- Brief for Petitioner-Gill, *Gill v. Whitford* No. 16-1161
- Brief for Respondent-Whitford, *Gill v. Whitford* No. 16-1161
- Transcript of Oral Argument, *Gill v. Whitford*, No. 16-1161

Secondary Materials:

- Adam Liptak, *When Does Political Gerrymandering Cross a Constitutional Line*? New York Times, May 15, 2017
- Chris Winkelman and Phillip Gordon, *Symposium: Mind the gap? The efficiency gap, its failures and the "problem" of geography and choice in redistricting*, SCOTUSblog (Aug. 8, 2017)
- Edward B. Foley, Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws, 84 U. Chi. L. Rev. 655, 710– 21 (2017)
- Eric McGhee, *Symposium: The efficiency gap is a measure, not a test*, SCOTUSblog (Aug. 11, 2017, 10:39 AM)
- Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap,* Public Law and Legal Theory Working Paper, No. 493 (2014)

- Richard Labunski, *James Madison and the Struggle for the Bill of Rights*, New York: Oxford University Press, 2006